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Criminal Procedure --Discovery--Pretrial Discovery Deposition in Utah Criminal Proceedings--State v. Nielsen

Manifestly then, *Jones & Laughlin* does not control the seventh amendment claim arising under the OSHA procedure in question. If that case is given a narrow reading, Judge Gibbons' distinction is conclusive. Even the expansive test implicit in Justice Marshall's characterization of *Jones & Laughlin* would not mandate a denial of a seventh amendment claim. And, certainly, *Jones & Laughlin* cannot support a holding that all administrative proceedings, including the OSHA enforcement procedure, are outside the scope of the seventh amendment.

IV. Conclusion

Subject to the foregoing clarifications and expansions, Judge Gibbons' position clearly represents the current state of the law and the best thinking. Accordingly, on rehearing, the Third Circuit Court of Appeals will be forced to deal with Judge Gibbons' conclusion with a more sophisticated analysis than was employed by the majority in the instant opinion. Hopefully, the Third Circuit Court of Appeals will shun the questionable judicial technique employed by the majority in *Irey* when that panel anticipated the Supreme Court, relying on no more than the "thrust" of certain precedents,[64] and refused to vindicate a fundamental right. Paraphrasing Judge Gibbons, in the absence of a case in point in the Supreme Court, it is preferable to assume that the seventh amendment still has meaning.[65]

Criminal Procedure–Discovery–Pretrial Discovery Deposition in Utah Criminal Proceedings–*State v. Nielsen*, 522 P.2d 1366 (Utah 1974).

The defendant, a Logan, Utah, city commissioner, was charged with misuse of public funds, a felony, and with a misdemeanor count of using his position to secure privileges or exemptions. Four days later he served seven Logan citizens with notice that their depositions would be taken pursuant to the Utah Rules of Civil Procedure. The prospective witnesses were also served with subpoenas duces tecum calling for the production of certain documents relating to the criminal charges. In response, the state quickly brought an action for a declaratory judgment to determine the defendant's right to take the depositions. The district court issued an order permanently stay-

[64] 3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,729 n.11.

[65] *Id.* at 22,735.

ing the taking of depositions and also staying the criminal actions pending appeal. From that order the defendant appealed to the Utah Supreme Court, which affirmed the lower court's decision and held that the defendant could not depose prosecution witnesses for discovery purposes.

I. DEPOSITIONS *DE BENE ESSE* AND THE DEVELOPMENT OF DEPOSITIONS FOR DISCOVERY

At common law there was no discovery.[1] By the 18th century, however, courts of equity had developed the suit to take testimony *de bene esse* or conditionally.[2] If the petitioner established (1) that the testimony of the witness sought to be deposed was material to a pending action at law; (2) that the witness was sick, old, or about to leave the country so as to present danger that his testimony would be lost; and (3) that there was no remedy at law, the chancellor would issue a decree authorizing a deposition *de bene esse*.[3] If the deposed witness thereafter became unavailable, the depositions taken pursuant to the chancellor's decree were admissible at trial in courts of law.[4] The goal of equity and the basis of its jurisdiction was the prevention of the injustice that would result if a key witness were unable to attend trial.[5] Discovery of the deponent's testimony was undoubtedly an incidental benefit of depositions *de bene esse*, but the device was viewed solely as a tool for preserving testimony and not as a means of discovery.[6]

The necessity of a collateral proceeding in equity to preserve testimony for an action at law proved cumbersome, and American jurisdictions, by statute, made the remedy of conditional examinations available at law.[7] The statutory schemes, which effectively super-

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[1]At early common law there was no pretrial discovery in civil cases, R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 201 (1952) [hereinafter cited as MILLAR]; James, *Discovery*, 38 YALE L.J. 746 (1929); nor in criminal cases, Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2 (1956); Note, *Criminal Discovery — The State of the Law*, 6 UTAH L. REV. 531 (1959). In equity a bill for discovery provided a limited and somewhat cumbersome opportunity for access to the opponent's case. MILLAR 201, 204; 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1846 (3d ed. 1940) [hereinafter cited as WIGMORE]. However, this bill found limited use in federal courts in the United States. Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1184 (1938); *see* James, *Discovery*, 38 YALE L.J. 746–49 (1929).

[2]*De bene esse* means "conditionally; provisionally; in anticipation of future needs." BLACK'S LAW DICTIONARY 476 (rev. 4th ed. 1968). For a discussion of the history in equity of this bill see J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 213–15 (4th ed. 1918) [hereinafter cited as POMEROY].

[3]Richter v. Jerome, 25 F. 679, 680–81 (1885); 1 POMEROY § 213.

[4]Unavailability of the witness was the condition (as in *conditional* examination) upon which the use of the deposition at trial depended. *See* 1 POMEROY § 213.

[5]1 POMEROY § 210.

[6]The bill was sought by the party to whose case the witness was material and favorable. There would seem to be little incentive to preserve the testimony of opposing witnesses. *See* Richter v. Jerome, 25 F. 679, 680–81 (1885).

[7]1 POMEROY §§ 210, 215.

seded examinations *de bene esse*,[8] generally followed the procedure in equity and required a showing of probable unavailability of a material witness as a prerequisite to taking a testimony for conditional use.[9] For example, the Utah statute passed in 1898 and modeled after a California law,[10] made conditional examinations available to criminal defendants if the deponent was material to the defense and if there existed reasonable grounds for concern that he would be unable to attend trial.[11] That statute, now codified as chapter 77-46 of the Utah Code Annotated, authorized the taking of conditional depositions of defense witnesses in the manner provided in that chapter "*and not otherwise*."[12]

The right to make conditional examinations was codified in Utah and other states long before the concept of liberal pretrial discovery gained wide acceptance.[13] The primary impetus for the liberal discovery deposition rules currently available was provided by the promulgation and adoption of the Federal Rules of Civil Procedure in 1938.[14] Rule 30 of the Utah Rules of Civil Procedure, which is substantially identical to the federal rule, exemplifies that liberality: merely by giving reasonable notice to other parties, one may take the testimony of any person by deposition upon oral examination.[15] No

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[8]1 POMEROY § 215.

[9]*See, e.g.*, Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 88–90 (also allowed when witness lives more than 100 miles from the place of trial); MASS. GEN. LAWS ANN. ch. 233, § 24 (1959).

[10]UTAH CODE ANN. § 77–46 (1953), *as amended* (Supp. 1973). This chapter was substantially identical to CAL. PENAL CODE §§ 1335–39, 41–44, 47 (West 1970), though the California statute has been modified since the enactment of the Utah law. An important modification was the deletion of the words "and not otherwise" in 1905. *Id.* at § 1335.

[11]The Utah statute does not allow prosecutorial depositions to preserve testimony. Wigmore explains that many states did not allow such depositions in deference to the sixth amendment right to confront witnesses. He claims that admitting previously taken depositions, after complying with the hearsay rule, however, is not violative of the constitutional provision. 5 WIGMORE § 1397. California has allowed introduction of prosecution depositions as far as constitutionally allowable. CAL. PENAL CODE §§ 1335–41 (West 1970).

[12]The statute, in relevant part, provides:

> When a defendant has been held to answer a charge for a public offense or malfeasance in office he may, either before or after an indictment or information, have witnesses examined conditionally, on his behalf, as prescribed in this chapter, *and not otherwise.*
>
> When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

UTAH CODE ANN. §§ 77–46–1, –2 (1953), *as amended* (Supp. 1973) (emphasis added).

[13]For a discussion of the status of discovery throughout the United States in the early part of the 20th century, see G. RAGLUND, DISCOVERY BEFORE TRIAL 32–36, 46–53, 267–391 (1932) [hereinafter cited as RAGLUND].

[14]For a discussion of the changes in discovery procedure made by the adoption of the federal rules see MILLAR 201–28. Most states have adopted substantial portions of the federal rules. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958).

[15]UTAH R. CIV. P. 30 (identical to FED. R. CIV. P. 30).

reason for taking the deposition need be given. Permission of the court is required only in special circumstances, and attendance of witnesses can be compelled by subpoena.[16] Although rule 30 depositions are admissible at trial if the witness becomes unavailable,[17] such depositions are most commonly used in practice for discovery purposes, not for the preservation of testimony.[18]

Pretrial discovery in criminal proceedings has been much more limited than in civil actions, though increasingly both prosecutors and defendants are being afforded the benefits of discovery procedures. For example, defendants have been given significant pretrial access to evidence held by the prosecutor,[19] and prosecutors in a few jurisdictions have been allowed advance notice of intended alibi defenses.[20] Also, a handful of states have followed Vermont by adopting rules which authorize discovery depositions in criminal proceedings.[21] Nevertheless, discovery depositions are not allowed under the recently adopted federal rules of criminal procedure; these rules only authorize the statutory analogue of deposition *de bene esse*.[22]

Utah has only indirectly confronted the question of criminal discovery depositions. In 1972, the Utah Supreme Court promulgated rule 81(e) as part of the Utah Rules of Civil Procedure. The rule provides that "[t]hese rules of [civil] procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, *provided, that any rule so applied does not conflict with any statutory or constitutional requirement.*"[23] Whether rule 81(e) authorized rule 30 depositions in criminal proceedings was an open question until 1974 when the Utah Supreme Court decided the case of *State v. Nielsen*.[24]

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[16]*Id.*

[17]Rule 30 depositions are admissible at trial under UTAH R. CIV. P. 32(a) if the witness is unable to attend or resides more than 100 miles from the court.

[18]For a survey of the use of depositions nationwide, see W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 58–67 (1968).

[19]*See generally* R. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 297–304 (1960); Note, *Criminal Discovery — The State of the Law*, 6 UTAH L. REV. 531 (1959).

[20]By 1971, 17 states had adopted statutes requiring defendants to give notice of an intended alibi defense. Comment, *The Alibi Witness Rule: Sewing Up the "Hip Pocket" Defense*, 11 SANTA CLARA LAW. 155, 156 (1971). As to the constitutionality of such statutes, see Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970).

[21]VT. R. CRIM. P. 15(a). Florida, FLA. R. CRIM. P. 3.220(d), Missouri, MO. R. CRIM P. 25.10, and New Hampshire, N.H. REV. STAT. ANN. § 517.13 (1968), have followed Vermont in allowing depositions without court approval. Other states allow discovery depositions with court approval. ALAS. R. CRIM. P. 15(a); MONT. REV. CODES ANN. § 95–1802(a)(1) (1948); OHIO REV. CODE § 2945.50 (1975); TEX. CODE CRIM. PROC. art. 39.02 (1966). A discussion of progress in allowing criminal discovery depositions is found in UNIFORM RULES OF CRIMINAL PROCEDURE 431(a), Comment.

[22]FED. R. CRIM. P. 15. This rule, adopted in 1946, 327 U.S. 825, 844, in addition to allowing depositions when the witness may be unable to attend trial, allows depositions of witnesses who have been committed for failure to give bail.

[23]UTAH R. CIV. P. 81(e).

[24]522 P.2d 1366 (Utah 1974).

II. The Utah Court's Rejection of Discovery Depositions in Criminal Proceedings

The plaintiff in the instant case, the State of Utah, argued that rule 30 depositions were not available in criminal proceedings because such depositions, in the words of rule 81(e), "conflicted with" the statutory provisions of chapter 77-46. That statute authorizes depositions only when it is probable that the deponent will be unavailable at trial. Rule 30 has no such limiting requirement and is available for discovery purposes as well as for the preservation of testimony. To the extent, therefore, that rule 30 deviates from the exclusive deposition procedure of chapter 77-46, it is in conflict with the statute.[25]

The defendant claimed that rule 81(e) authorized the taking of rule 30 depositions in criminal cases. He argued that allowance of discovery depositions would not conflict with any statutory or constitutional provisions. Chapter 77-46 was the only statute that discussed depositions by criminal defendants, and it encompassed within its scope only depositions to preserve testimony and *not* discovery depositions.[26]

The court was thus faced with the question of whether rule 30 discovery depositions were within the scope of chapter 77-46's regulation of conditional examinations. If discovery depositions were not included in that prohibition, then by the terms of rule 81(e) the defendant was entitled to take depositions pursuant to rule 30. The court held that the statutory provision that a witness may not be examined conditionally other than as provided in chapter 77-46 includes within its meaning *all* types of depositions. Discovery depositions are therefore not available to criminal defendants.[27]

The court also reasoned that rule 30 depositions would conflict with the self-incrimination privilege of the Utah constitution.[28] Rule 30 provides that "*any party* may take the testimony of *any person, including a party*,"[29] thus leaving the door open for attempts by prosecutors or codefendants to take depositions of witnesses, including defendants. The court stated that "[a]n *attempt* to take a deposition of a [criminal] defendant would violate his right against self-incrimination and his right to remain silent."[30] In conclusion, therefore, the court held that rule 30 depositions are not available in criminal proceedings because, in the language of rule 81(e), such depositions conflict with the statutory provisions of chapter 77-46 and the constitutional protections against compelled self-incrimination.

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[25]Brief for Appellee at 2–5, State v. Nielsen, 522 P.2d 1366 (Utah 1974).

[26]Brief for Appellant at 4–6, State v. Nielsen, 522 P.2d 1366 (Utah 1974).

[27]522 P.2d at 1366–67.

[28]*Id.* at 1367.

[29]Utah R. Civ. P. 30(a) (emphasis added).

[30]522 P.2d at 1367 (emphasis added).

III. ANALYSIS

A. Misconstruction of Chapter 77-46 and of the Privilege Against Self-Incrimination

There are indications that the Utah Supreme Court in *Nielsen* misconstrued chapter 77-46 and misapplied the self-incrimination privilege and thus incorrectly denied the defendant his opportunity to depose prosecution witnesses. The statute now codified as chapter 77-46 was originally passed in 1898.[31] It could not have been passed in contemplation of discovery depositions: such depositions were not available under Utah law at that time, they were not in use in any jurisdiction, and no statute was needed to proscribe their use.[32] The limiting language of the statute, that a defendant may "have witnesses examined conditionally . . . as prescribed in this chapter *and not otherwise*,"[33] can only with difficulty be interpreted as a prohibition of a device not in existence when the statute was adopted. Arguably the sole intent of the legislature in drafting chapter 77-46 was to make available to criminal defendants in courts of law the equitable remedy of the deposition *de bene esse* and to limit and control the application of the remedy.[34] The "and not otherwise" language serves merely to limit conditional examinations to those circumstances where a material witness is likely to become unavailable at a later trial, a requirement long a part of examinations *de bene esse* but not a part of discovery deposition procedures that developed later. Chapter 77-46 is more correctly construed, therefore, as a definition of the parameters of the opportunity to *preserve* testimony and not as a prohibition of a device—discovery depositions—not in existence at the time of the adoption of the statute.

The fact that the statute deals only with a defendant's examination of his own witnesses is further evidence that discovery depositions were not within the contemplation of chapter 77-46 and, therefore, not within the scope of its prohibition. Indeed, that fact clearly reveals that chapter 77-46 is an expression of the basic purpose of examinations *de bene esse*, preservation of a beneficial

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[31]UTAH REV. STAT. ch. 48 (1898).

[32]Although a few jurisdictions began to allow discovery depositions in the early 20th century in civil practice, RAGLUND, *supra* note 13; Mullen, *Depositions in Massachusetts and New Hampshire*, 2 BOSTON B.J. 21, 23–24 (1958), there is no evidence of use of such depositions in criminal proceedings.

[33]UTAH CODE ANN. § 77–46–1 (Supp. 1973).

[34]The legislature could have (1) prohibited the taking of depositions except on a showing of probable unavailability or (2) allowed them to be taken only at the discretion of the judge. See 6 WIGMORE § 856(d), at 440. In any event, the legislature limited the use of depositions unless the witness in fact were unavailable. UTAH CODE ANN. 77–46–11 (1953):

> The deposition, or a certified copy thereof, may be read in evidence by either party on the trial when it appears that the witness is unable to attend by reason of his death, insanity, illness or infirmity, or of his continued absence from the state.

testimony.[35] One does not depose one's own witness for discovery purposes. By the same token, one does not depose adverse witnesses to ensure the preservation for trial of their testimony. By limiting the scope of chapter 77-46 to depositions of the defendant's own witnesses, the legislature left discovery depositions, such as those provided for by rule 30, unprohibited.

The court's argument that rule 30 depositions could be taken in violation of the self-incrimination privilege is also infirm. Simply stated, the deposition provisions of the rules of civil procedure cannot be used to compel either a nondefendant witness or a defendant witness to give incriminating testimony. A *non*defendant witness' privilege against self-incrimination, for example, is only a privilege to refuse to answer a particular question, and then only when the answer to the question might incriminate him.[36] Even in criminal proceedings he may be compelled to appear in court, to be sworn, and to answer nonincriminating questions.[37] By analogy, it would not violate a nondefendant witness' constitutional right to subpoena him to give a deposition, to require him to be sworn, and to require his answers to nonincriminating questions.[38]

Even an attempt to depose a *defendant* witness does not violate his right not to be compelled to testify against himself. The privilege of an accused includes the right not to take the witness stand. [39] Indeed, at trial the prosecution is probably precluded from even calling the accused as a witness on the theory that to do so would unfairly emphasize to the jury the accused's failure to testify. [40] However, there would be no prejudicial effect in merely asking a defendant, outside of the jury's presence, to give a deposition. The only question is whether he will be compelled to testify against himself at a deposition under the rules of civil procedure.

Taking those rules as a whole, they provide ample protection against compulsory depositions of a criminal defendant. A defendant has two basic alternatives to avoid testifying. He may seek a protective order to stop the deposition proceedings pursuant to rule 26(c),[41] or he may simply refuse to be sworn or to answer any questions or even to appear at the deposition.[42] The first alternative requires affirmative action by the defendant in the form of a motion

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[35]The dichotomy between the two types of depositions is illustrated by the dilemma sometimes faced by a party who, by discovering an opposing witness' testimony, may be preserving testimony that would prove harmful if the witness died or otherwise became unavailable. RAGLUND 52.

[36]8 WIGMORE § 2268, at 402–04.

[37]*Id.*

[38]*Id.*

[39]*Id.*

[40]*See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 131 (E. CLEARY ed. 1972).

[41]UTAH R. CIV. P. 26(c).

[42]Refusal to be "discovered" is apparently prima facie grounds for an order compelling answers. UTAH R. CIV. P. 37(a)(2). However, there is no indication that such an order would be granted in violation of a defendant's rights.

to the court for a protective order. Yet the rules authorize such an order "to protect a party or person from annoyance, embarrassment, oppression or undue burden."[43] Violation of an accused's constitutional right not to be compelled to testify against himself should qualify as embarrassment or oppression and hence as sufficient grounds for the issuance of a protective order.

The defendant's second alternative—refusal to be sworn and to testify—does not require affirmative action by the defendant. Rather, the party seeking discovery must, by motion to the court, seek an order compelling the defendant to take the stand as a deponent. As an abridgement of his right against self-incrimination, the motion would be denied.

B. Pros and Cons of Discovery Depositions in Criminal Proceedings

Though the court misconstrued both statutory and constitutional doctrines to reach its conclusion in *Nielsen*, perhaps it had sound policy reasons for concluding that discovery depositions should not be allowed in criminal cases. There is the possibility that allowing discovery by a defendant would invite contrived defenses and perjury.[44] Also, easy access to witnesses might facilitate intimidation of witnesses.[45] And if defendants already have a weighted advantage in the criminal adversary process,[46] defense discovery should be limited so as to counterbalance restrictions imposed on the prosecution by self-incrimination and due process doctrines.

Yet the arguments against criminal discovery, though widely supported in judicial opinions, are not ultimately persuasive. For example, in an oft-cited opinion denying discovery, the New Jersey Supreme Court argued that "in criminal proceedings, long experience has taught the courts that often discovery will not lead to honest fact-finding, but on the contrary to perjury and suppression of evidence."[47] But the court offers no details of its own experience. In fact, New Jersey, along with most jurisdictions, has had little or no experience with criminal discovery because they have provided no procedure therefor.[48] What experience there is suggests that the fears of perjury and intimidation of witnesses are unfounded.[49] One observer of the results of Vermont's experiment with liberal criminal depositions claimed that those fears had not been realized after 5

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[43]UTAH R. CIV. P. 26(c).

[44]*See, e.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 289 (1963) [hereinafter cited as Brennan].

[45]*Id.*

[46]*Id.*; Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 57 (1961).

[47]State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953).

[48]Brennan 290–91.

[49]*Id.* The fear of perjury was also a common argument against discovery in civil cases. Experience has not substantiated those fears. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951).

years of liberal criminal deposition rules.[50]

In regard to pretrial discovery, concern about an imbalance in favor of criminal defendants is likewise not well founded. [51] Although the prosecution cannot force the defendant to reveal incriminating information, the prosecution does have access to policy investigations as well as to grand jury proceedings. Also, in Utah, the prosecution is allowed by statute to take secret inquiry depositions.[52] In contrast, the defendant often has limited investigative resources,[53] and, absent liberal discovery rules, he cannot compel witnesses to give any information before trial.[54]

Proponents of more liberal discovery argue that the goal of the criminal system is to protect society's interests, and those interests are best served if both parties have an adequate opportunity to prepare for trial.[55] The Utah Supreme Court recognized the strength of that argument in *State v. Guerts*,[56] holding that it was error, though not prejudicial,[57] to deny a defendant the right to take rule 30 depositions in a quasi-criminal removal proceeding. The court questioned "why the district attorney opposed the taking of depositions,"[58] and stated:

> [The prosecutor] may have misconceived his duty. Notwithstanding the fact that under our adversary system it is essential that he represent and safeguard the interests of the State, it is neither necessary nor desirable that a prosecutor conduct either a persecution or an inquisition. His responsibility is to assist in an inquiry into the facts to ascertain the truth to the end that justice be done.[59]

The dissent in *Guerts*, arguing that denial of the right to take pretrial depositions was prejudicial error, pointed out that the use at trial of discovery depositions which demonstrate prior inconsistent testimony and thus impeach a witness "may make the difference between guilt and innocence in the minds of the veniremen."[60] Pretrial discovery allows adverse parties to make clear to the jury the strengths and weaknesses of the evidence on each side, thus aiding the quest for the "truth" of the particular case. Discovery depositions in criminal proceedings should be allowed to the extent that

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[50]Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732–34 (1967).

[51]Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152, 1180–92 (1960) [hereinafter cited as Goldstein].

[52]UTAH CODE ANN. § 77–45–20 (Supp. 1973).

[53]Goldstein 1182–83.

[54]*Id.*

[55]*See, e.g.*, Brennan 291.

[56]11 Utah 2d 345, 359 P.2d 12 (1961).

[57]The court held that it was not reversible error in that case because the defendant had access to the testimony of the witnesses before the grand jury and was given answers to interrogatories served upon the prosecution. *Id.* at 351, 359 P.2d at 17.

[58]*Id.* at 350, 359 P.2d at 16.

[59]*Id.*

[60]*Id.* at 353, 359 P.2d at 18 (dissenting opinion).

protection against misuse or inequalities to parties can be reasonably assured.

C. The Problem with Rule 81(e)

The court in *Nielsen* perhaps recognized that it would be unwise to apply civil discovery rules[61] in criminal proceedings without first considering problems unique to criminal procedure. There is the need, for example, to balance the opportunities for prosecutor and accused to prepare for trial. The rules of civil procedure provide a relatively neutral discovery system.[62] But a system of criminal discovery ought to consider and, to the extent possible, balance some of the factors already present in the criminal system which, in different ways, handicap trial preparation by either the prosecution or the defense.[63] The prosecutor is severely limited in what he can discover from the opposing party because of the self-incrimination privilege. The prosecutor does have, however, greater opportunities to discover information held by nonparty witnesses since he can often compel them to give testimony at depositions or before a grand jury.[64] The defendant, except in special circumstances such as preliminary hearings, cannot force witnesses to give information prior to trial.[65] The rules of civil procedure, as used in criminal proceedings, do not achieve an adequate or fair compromise of these competing considerations. The civil rules were not designed with the peculiar problems of criminal discovery in mind. Certainly rule 81(e)'s application of the rules of civil procedure to criminal proceedings does not demonstrate the well-thought-out approach to criminal discovery that ought to be incorporated into any criminal discovery scheme.

IV. CONCLUSION

If rule 81(e) was intended as a poorman's set of criminal procedure rules, it has demonstrated its deficiencies. The court should repeal rule 81(e) and adopt comprehensive rules of criminal procedure. The Utah court has been authorized to promulgate rules that could clearly define the allowable parameters of discovery,[66] and certainly models are available from which the court could frame effective rules. The court could choose not to allow depositions other than as provided by the scheme of chapter 77-46. This is the

[61]The question facing the court involved only rule 30 depositions, but the court attempted to prohibit all use of civil discovery devices. 522 P.2d 1366, 1367 (1974).

[62]W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 89 (1968).

[63]*See generally* Goldstein, *supra* note 51.

[64]*Id.* at 1187–92.

[65]*Id.* at 1180–82.

[66]UTAH CODE ANN. § 78-2-4 (1953) (rules of procedure adopted by the court will supersede any conflicting procedural laws).

approach of the Federal Rules of Criminal Procedure.[67] Alternatively, the court could follow the Uniform Rules of Criminal Procedure and allow defendants to take depositions without court order.[68] The Uniform Rules contain some protection for both the prosecution and the defense, and the court could devise further protections if such appeared necessary. A third "middle ground" alternative adopted by some states is to allow discovery depositions only on court order.[69]

Whatever alternative the court may select can only be superior to the present scheme of rule 81(e). That scheme all too easily leads, as the *Nielsen* case demonstrates, to artificial construction or even misconstruction of statute and rule and to an ad hoc creation of rules of criminal procedure.

Torts–ATTRACTIVE NUISANCE–A NEW RATIONALE FOR REFUSING TO EXTEND LIABILITY FOR INJURIES CAUSED BY NATURAL CONDITIONS– *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974).

The attractive nuisance doctrine has not generally been applied to injuries arising from natural conditions on property.[1] For some time, however, commentators have urged that liability be applied regardless of the origin of the condition.[2] They have argued that all cases to date denying attractive nuisance liability for natural conditions have involved hazards which the child should have understood,[3] and that in the great majority of instances the burden on the landowner of removing the hazard would be excessive.[4] The claim is that should a case arise in which the child does not understand the condition and in which the burden on the landowner of protecting the child is relatively light, there is no valid reason why liability should not be

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[67]FED. R. CRIM. P. 15. *See* note 22 *supra.*

[68]*See* note 21 *supra.*

[69]*See* note 21 *supra.*

[1]*See, e.g.,* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.5, at 1452 (1956); W. PROSSER, THE LAW OF TORTS § 59, at 367 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); Prosser, *Trespassing Children,* 47 CALIF. L. REV. 427, 446 (1959) [hereinafter cited as *Trespassing Children*]; 2 OKLA. L. REV. 537, 537–38 (1949).

[2]*See, e.g.,* PROSSER § 59, at 367; *Trespassing Children* 446; Note, *Trespassing Children: A Study in Expanding Liability,* 20 VAND. L. REV. 139, 150 (1966) [hereinafter cited as *Expanding Liability*]; 2 OKLA. L. REV. 537, 538 (1949).

[3]PROSSER § 59, at 367; RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); *Trespassing Children* 446.

[4]RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); *Trespassing Children* 446.